

The claimant alleged that she suffered a series of repetitive injuries to her low back and right leg from March 8, 2002, through her last day worked for respondent on September 11, 2002. The respondent and its insurance carriers argued that claimant's

condition was a natural and probable consequence of a work-related injury she had suffered in 2000. The Administrative Law Judge (ALJ) found the claimant suffered repetitive trauma and awarded her a 29.5 percent work disability based upon a 25 percent task loss and a 33.9 percent wage loss.

The respondent and Zurich request review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) nature and extent of disability, if any; and, (3) whether claimant is entitled medical expenses. Respondent & Zurich initially argue claimant's complaints are the natural and probable consequence of a previous injury and she has failed to establish she suffered a new injury. Respondent and Zurich further argue claimant's permanent restrictions remained the same both before and after the alleged injury in this case and, consequently, claimant has not suffered any additional task loss. Respondent and Zurich also contend claimant was earning more than 90 percent of her pre-injury wage when she left her job with respondent for personal reasons unrelated to her alleged accidental injury and therefore she is not entitled to a work disability. Finally, respondent and Zurich argue that claimant's request for payment of the Coffey County Medical Center bill should be denied because it was her personal physician and not the authorized physician who referred her for the hospital services.

The respondent and Legion argue that claimant's low back and hip injuries are the direct and natural consequence of her previous injury in Docket No. 264,327. In the alternative, Legion notes that the date of accident for the alleged repetitive series of accidents would be claimant's last day worked on September 11, 2002, which would be during Zurich's worker's compensation insurance coverage of respondent and therefore Zurich is liable. Legion also argues that claimant should not receive a work disability as she voluntarily resigned from her accommodated employment with respondent. Finally, Legion argues the issue of payment of medical expenses was not raised before the ALJ and cannot be raised for the first time on review before the Board.

Claimant argues she is entitled to a 28.9 percent work disability based upon a 23.9 percent task loss and a 33.9 percent wage loss. Claimant further argues she is entitled to payment of her medical expenses incurred by Drs. Cordell and Wendt.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The initial issue for determination is whether claimant suffered accidental injury arising out of and in the course of her employment and, if so, the date of accident. The claimant alleged that she suffered repetitive injuries beginning March 8, 2002, through her last day worked on September 11, 2002.

The claimant began working for respondent in 1997 and described an incident while lifting “Pintles” at work in October 2000 which caused her back and hip pain. She also developed carpal tunnel syndrome and filed claims for workers compensation benefits for those injuries. An Agreed Award was entered on August 30, 2002, which resolved those claims in Docket Nos. 264,327 and 264,328. The Agreed Award determined claimant had met with personal injury by accident each working day up to August 9, 2000, and November 15, 2000, and each working day thereafter through May 25, 2001. The award of a 14 percent whole person functional impairment included a 7 percent functional impairment for claimant’s lower back.<sup>1</sup>

As a result of the previous injuries, claimant had been given restrictions which were accommodated by the respondent. As claimant continued working she also continued to have complaints of back pain. Dr. Richard G. Wendt had treated claimant for her previous workers compensation claims and she returned to him on March 2, 2002, with complaints of back pain. It is significant to note that claimant related her condition to the lifting incident at work in October 2000 and noted that since then she had continued to experience pain in her right lower back and hip. Dr. Wendt continued to provide claimant conservative treatment through March 10, 2003, when he determined she had reached maximum medical improvement. Dr. Wendt rated claimant’s hip and back at 4 percent. Dr. Wendt initially apportioned the rating at 2 percent for the October 2000 injury and 2 percent for subsequent aggravation. But upon cross-examination the doctor ultimately agreed that all of claimant’s rating was a natural and probable consequence of claimant’s October 2000 accidental injury. The doctor testified:

Q. It sounds like she had had basically the same condition from October, 2000, forward.

A. Correct.

Q. So if that’s the case is it at all attributable back to the original October, 2000, injury.

A. Well, if we have to have a, I assume a starting point and when it all began, from the history she’s given me, then it was at that point, yes.

Q. It never got worse after that, at least symptomatically?

A. She seemed at times to get better and then she’d be back to where she was, correct.

Q. But at no time did she ever report that she actually was worse than she was in October of 2000, did she?

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<sup>1</sup> R.H. Trans. Cont’d. (Aug. 25, 2006), Resp. Ex. 2.

A. No, I don't believe so.

Q. The coccydynia emerged after she stopped working at Tramec. Is that correct?

A. That's correct, and it was sort of almost, in my opinion, was sort of unrelated.

Q. So you're not relating the coccydynia to her work at Tramec, then. Is that correct?

A. That's correct.

Q. And the coccydynia is not part of your rating?

A. That's correct.

Q. And the coccydynia is not part of your opinion with regard to work restrictions?

A. Correct.

Q. Were there any other new or different conditions that you saw as of March of 2003 that had not been there at the time you gave your rating, besides the coccydynia?

A. No, there was no other new symptoms or findings.

Q. Can you state with a reasonable degree of medical probability, then, that all of your ratings for the low back and/or the hip, or and the hip, rather, that all of that rating, then, is the direct and natural consequence of the original October, 2000, injury?

A. Yes, that's been my assumption, yes.

Q. And no part of that rating, then, is attributable to any permanent aggravation that occurred thereafter; correct?

A. Well, it's sort of speculation that she, you know does things that will aggravate it long term, some work related and some not, but that injury seems to have started a sequence of the problems that she continued to have.

Q. Well, I need to try to clarify that a little bit more. You are not attributing any of her impairment rating to any actual injury or permanent aggravation that occurred after October, 2000, are you?

A. That's correct. I don't think that you can because we, I have no other history of any other injury that would have specifically brought it on or aggravated it further.<sup>2</sup>

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<sup>2</sup> Wendt Depo. at 51-53.

On re-direct examination the doctor attributed claimant's hip problems to the October 2000 injury but equivocated and agreed she aggravated it while she continued working. But on re-cross examination the doctor again agreed that claimant's condition was never any worse in 2002 than when he saw claimant in 2001.

The claimant was examined by Dr. Larry D. Cordell on May 18, 2004, upon referral from her personal physician. The claimant had continued complaints of right hip and back pain. The claimant provided the doctor a history of an onset of pain from lifting at work in October 2000. Dr. Cordell diagnosed claimant with chronic lumbosacral spine strain with right lower extremity radiculopathy. The doctor concluded that claimant's condition was a natural consequence of the lifting incident at work in October 2000. Dr. Cordell testified:

Q. Doctor, your diagnosis of lumbar sprain with some element of radiculopathy, given the history she related to you and as found in your first report of May 18, 2004, do you believe that diagnosis of lumbar strain is a natural consequence of the lifting incident she described at work in October of 2000?

A. I'd have to say yes, from what the patient told me.

Q. You have no history to suggest she suffered additional or aggravating injury thereafter, do you, sir?

A. I don't believe there was anything mentioned that I'm aware of.<sup>3</sup>

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at her attorney's request. Dr. Prostic had provided an opinion regarding claimant's rating and restrictions after the previous work-related injuries claimant had suffered. On November 1, 2004, Dr. Prostic re-examined and evaluated the claimant due to continued complaints of pain in her low back and right hip. "An MRI of the lumbar spine dated July 25, 2002 shows no significant abnormality. A bone scan dated February 19, 2003 shows no significant abnormality about the pelvis or hips."<sup>4</sup> Based upon the AMA *Guides*<sup>5</sup>, Dr. Prostic opined the claimant's sustained an additional 5 percent to the body as a whole which was attributed to the repetitious work she performed through her last day worked on September 11, 2002. Dr. Prostic imposed restrictions for her back against lifting weights greater than 30 pounds occasionally or 10 pounds frequently. Claimant should avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, or captive positioning. But Dr. Prostic agreed that

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<sup>3</sup> Cordell Depo. at 31-32.

<sup>4</sup> Prostic Depo., Ex. 5 at 2.

<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant's restrictions did not change between his January 25, 2002 examination and the November 1, 2004 examination.

On April 18, 2005, the ALJ entered an Order for Dr. Vito Carabetta to perform an independent medical examination of claimant. In his report dated June 21, 2005, Dr. Carabetta noted that he took the history from claimant which indicated an injury date in 2000. She stated that her low back complaints started after lifting parts at work. Dr. Carabetta performed a physical examination of claimant and diagnosed her with chronic low back pain; right trochanteric bursitis and right hip acetabular dysplasia. The doctor noted that the majority of claimant's complaints were from her right hip acetabular dysplasia which the doctor opined was not related to her work injury. And the doctor further opined that the trochanteric bursitis was secondary to the acetabular dysplasia and not related to her work injury.

Based upon the *AMA Guides*, Dr. Carabetta rated claimant with a 5 percent functional impairment to her lower back which he specifically attributed to claimant's accident in 2000. The doctor suggested permanent restrictions that maximum occasional lifting be limited to no more than 50 pounds. Maximum frequent lifting or carrying should not exceed 25 pounds. Also, claimant should only occasionally bend or stoop.

Finally, claimant confirmed that the instant claim was filed because her low back was still hurting from the incident lifting the Pintle hooks in 2000.<sup>6</sup>

Claimant argues that as she continued working for respondent she suffered repetitive trauma which aggravated her pre-existing low back condition. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>7</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>8</sup>

Conversely, respondent and its insurance carriers argue that claimant's continued complaints are the natural and probable consequence of her previous work-related injury in 2000. Every direct and natural consequence that flows from a compensable injury,

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<sup>6</sup> R.H. Trans. Cont'd. (Aug. 25, 2006) at 45-46.

<sup>7</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>8</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*<sup>9</sup>, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

The claimant repeatedly advised the treating doctors that her back and hip complaints began with the incident lifting at work in 2000. Dr. Wendt treated claimant after her previous injuries and then again when she continued to complain of back and hip pain. Although the doctor was somewhat equivocal he ultimately concluded claimant's condition was the natural and probable consequence of her injury in 2000. And he noted her condition never worsened, instead it would improve and then return to the base line condition.

In *Logsdon*<sup>10</sup> the Kansas Court of Appeals noted that in the determination whether an injured worker's condition is a natural consequence of the primary injury or a new and distinct injury a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury. Claimant's continued complaints relating her condition back to the incident in 2000 indicate that her condition had never fully healed following that injury.

After Dr. Wendt had released claimant from treatment she later sought treatment with Dr. Cordell and he concluded her continued complaints were the natural and probable consequence of her injury in 2000. Finally, the court ordered independent medical examiner, Dr. Carabetta, reached the same conclusion that claimant's condition was a natural and probable consequence of her work-related injury in 2000. The Board concludes the preponderance of the credible medical evidence establishes that claimant's condition was the natural and probable consequence of her injury in 2000 and that she has failed to meet her burden of proof to establish she suffered repetitive injuries from March 8, 2002, through her last day worked. Consequently, the ALJ's Award is reversed and claimant is denied benefits.

The Board is mindful that Dr. Prostic opined claimant suffered additional permanent impairment as a result of aggravation of her condition as she continued working for respondent. But Dr. Prostic was unaware of what job activities claimant performed as she continued working and his permanent restrictions never changed from those imposed after

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<sup>9</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>10</sup> *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

her previous injury. Simply stated, the Board finds the opinions of the other physicians more persuasive, especially Drs. Cordell and Carabetta, who opined that claimant's condition was the natural and probable consequence of her work-related injury in 2000.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated March 2, 2007, is reversed and claimant is denied benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant  
Larry Shoaf, Attorney for Respondent and Zurich North American Ins. Co.  
Gregory D. Worth, Attorney for Respondent and Legion Insurance Co.  
Thomas Klein, Administrative Law Judge